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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH 38

UNITED STATES OF AMERICA

v.

MALCOLM HINES

Criminal Case No. 2011-CF2-005624

Judge Robert I. Richter

Sentencing: December 9, 2011

GOVERNMENT'S SENTENCING MEMORANDUM

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this memorandum, together with such other points as may be raised at the sentencing hearing, in connection with the sentencing of the defendant, Mr. Malcolm Hines.

I. Background

This case arises from the defendant's unlawful possession of a loaded shotgun on March 28, 2011. Specifically, a jury found the defendant guilty of Unlawful Possession of a Firearm (given that the defendant had been previously convicted of crimes punishable by imprisonment for a term exceeding one year), Possession of Unregistered Firearm, and Unlawful Possession of Ammunition.

The evidence at trial established that the defendant owns the City Beats shoe and clothing store located at 3014 Martin Luther King, Jr. Avenue, SE, Washington, DC. On March 28, 2011, the defendant was working at the store when a customer entered the shoe store with his son and one of his son's friends. The customer's son had been at the shoe store earlier that same day to discuss a pair of mis-matched shoes that the son had purchased. The customer returned to the store with his son to attempt to exchange or return the mis-matched shoes. When the customer

entered the shoe store and began to discuss the mis-matched shoes with the defendant, the defendant was standing behind the counter. The defendant then walked into a storage closet next to the counter. The customer heard the defendant say "I knew you'd be back" and then heard the sound of a shotgun being racked. While the defendant was standing in the threshold of the doorway, the customer saw a small portion of the barrel of the shotgun near the defendant's lower leg. The customer and the defendant continued to discuss the shoes that the customer's son had purchased. Eventually, the defendant returned to the area behind the counter and offered the customer a different pair of shoes that cost less than the pair that the customer's son originally purchased. During their discussions regarding the mis-matched shoes, the defendant told the customer that it was "not going to be sweet in here." The customer then took the cheaper pair of shoes and left the store with his son and his son's friend.

The customer called 911 and members of the Metropolitan Police Department responded to the City Beats store at approximately 1:45 pm. The defendant was present in the store when officers arrived. The defendant appeared nervous and was sweating. Officers asked the defendant if they could search the store, but the defendant did not consent to a search of the store.

Officers obtained a search warrant later that day and found a loaded shotgun in the storage closet next to the counter. The shotgun was located in the corner of the storage closet behind a wood board.

At the time of this offense, the defendant had several prior felony convictions. In addition, the defendant did not have a Firearms Registration Certificate for the shotgun in the District of Columbia.

The defense presented two witnesses at trial. The first witness, Joetta McLamore, is the defendant's sister-in-law and was employed part-time by the defendant at the City Beats store.

Ms. McLamore claimed that she purchased the shotgun in Maryland for her own protection and that she initially kept the shotgun at her home. Ms. McLamore claimed that she eventually decided to start taking the shotgun with her to the City Beats store. Ms. McLamore claimed that she would wrap the shotgun in a blanket and drive it to the City Beats store, where she would carry it into the store and keep it in the storage closet next to the counter. Ms. McLamore claimed that no one – including the defendant, her brother-in-law and employer – knew that she purchased a shotgun or that she was bringing the shotgun back and forth to the City Beats store.

At trial, Ms. McLamore claimed that she had loaded the shotgun prior to March 28, 2011, and left it in the storage closet in the City Beats store. However, Ms. McLamore also admitted that when she met with the Government to discuss her testimony before the trial began (so that she could receive use immunity with regard to her testimony at the defendant's trial),¹ she told the Government that the shotgun was never loaded when she brought it into the store and that she never loaded the shotgun while in the store. Finally, Ms. McLamore acknowledged that she was not present at City Beats on March 28, 2011.

The defense's second witness, Darren Jones, testified that he frequents the City Beats store and knows the defendant. Mr. Jones claimed that he was at the City Beats store on March 28, 2011, and that while he was in the store, two to three individuals came in to discuss a pair of mis-matched shoes with the defendant. Mr. Jones claimed that he did not see the defendant go into the storage closet next to the counter and that he did not hear the defendant rack a shotgun. Mr. Jones claimed that he was still in the store when the police arrived and that the police told

¹Pursuant to Carter v. United States, 684 A.2d 331 (D.C. 1996), Ms. McLamore and her attorney met with the undersigned Assistant United States Attorney and two officers with the Metropolitan Police Department to discuss her testimony and the Government granted Ms. McLamore use immunity with regard to her testimony at the defendant's trial.

him that he could not leave. Finally, despite the fact that officers did not respond to the City Beats store until approximately 1:45 pm, Mr. Jones claimed that he remained in the store for some time after officers arrived, and that once the police let him leave the store, he drove back to his place of work - a drive that typically took over 15 minutes - and arrived there at approximately 2:00 pm.

Mr. Jones' testimony was contradicted by the testimony of one of the officers who initially responded to the City Beats that when officers arrived, there were customers present in the store and officers immediately asked those individuals to leave the store and did not ask any of the customers to remain in the store.

On October 13, 2011, the jury returned its verdict of guilty on all charges. As a result, the Court held the defendant without bond pursuant to 23 D.C. Code Section 1325(b).

In preparation for sentencing, the Court Services and Offender Supervision Agency for the District of Columbia ("CSOSA") prepared a Presentence Report ("PSR") concluding that the applicable guideline range is 30-54 months, with the defendant being ineligible for probation or a split sentence. In this case, a statutory enhancement applies and increases the upper end of the guideline range to 162 months (*i.e.*, three times 54 months).² See D.C. Code Section 1804a(a)(1). The defendant is also subject to a statutory mandatory-minimum term of imprisonment of one year for Unlawful Possession of a Firearm.²

² On October 6, 2011, the Government filed with the Court an Information As to Previous Felony Convictions that provided notice to the Court and the defendant that because the defendant had been previously convicted of 2 or more prior felonies not committed on the same occasion, the Court may, in lieu of any sentence authorized, impose such greater term of imprisonment as it deems necessary, up to, and including 30 years.

² In preparation for sentencing, the Government contacted the customer who has stated he does not wish to make a victim impact statement in this case.

II. Sentencing Considerations

At sentencing, the Court must consider the seriousness of the offense, the criminal history of the defendant, and impose a sentence that provides for just punishment and adequate deterrence to potential criminal conduct of the defendant and others. D.C. Code 24-403.01(a) (2001 ed.). The Court may consider a wide variety of information regarding the defendant's background, character, and conduct, criminal or otherwise, when imposing a sentence. See Williams v. United States, 427 A.2d 901, 904 (D.C. 1980), cert. denied, 450 U.S. 1043 (1981) (the sentencing judge "may consider a wide range of facts concerning a defendant's character and his crime").

The charges in this case are serious, and the defendant's conduct in this case was dangerous. The potential for serious harm always exists when firearms are present. In this case, the defendant's actions at the time that the customer entered the store are particularly troubling. The defendant made a choice to introduce the presence of a loaded shotgun into a discussion with a customer about returning or exchanging merchandise and thus transformed the discussion into a potentially violent situation. The defendant picked up the loaded shotgun and racked it in the presence of the customer – an act reasonably intended to frighten and intimidate the customer and an act that itself could be the basis of the separate criminal charges of Assault With a Dangerous Weapon and Threats. The defendant's own choices and actions created a situation that could have turned much worse.

In addition to the offense conduct discussed above, this Court should look to the defendant's criminal history in fashioning an appropriate sentence. This case represents the defendant's seventh felony conviction. Those prior convictions include a 1996 conviction for Carrying a Pistol Without a License, Possession of Unregistered Firearm, and Unlawful

Possession of Ammunition in the District of Columbia. In that case, the defendant was in possession of a loaded .380 caliber handgun that had a round in the chamber. Officers attempted to stop the car that the defendant was driving and the defendant fled from officers at a high rate of speed, eventually crashing his car and fleeing on foot. The defendant then removed the loaded gun from his waistband and threw it as he continued to run from officers. In his comments to the presentence report writer, the defendant stated that he had been carrying the gun for protection due to events earlier that day.

The defendant also has a prior felony conviction for Threatening to Injure a Person, in a case where an Obstruction of Justice charge was dismissed as part of the plea agreement. In that case, the defendant threatened to kill the mother of his child if she testified in a pending assault case involving the defendant.

Finally, the defendant also has four prior felony drug convictions, including two convictions in 2003. Indeed, the defendant's court supervision had concluded only a few months before the time of the instant offenses.

The defendant's acceptance of responsibility must also be considered. As an initial matter, the Government does not suggest that because the defendant has not accepted responsibility for his actions the defendant deserves increased punishment. However, the defendant's refusal to face up to his violations of the law undercuts his plea for mercy given the Government's strong evidence that the defendant possessed and racked the loaded shotgun – evidence obviously credited by the jury.

At trial, the defense presented the testimony of two witnesses who were neither truthful nor credible. Ms. McLamore herself admitted that her testimony was materially different from the information that she provided to her attorney and the Government at the beginning of the

trial. Mr. Jones' testimony was internally inconsistent and was directly contradicted by a police officer witness. The jury's verdict shows that the jury did not credit either defense witness, yet the defendant continues to decline to accept responsibility for his conduct. Despite the jury's verdict, in his interview with the PSR writer, the defendant admitted only that the shotgun is registered to his sister-in-law and did not express any remorse for his actions. While the Government is not seeking an upward departure for this conduct as an act of obstruction, the sentencing guidelines provide that the Court may consider if a defendant induced or attempted to induce a witness to provide false testimony. See Guideline 5.2.2(7).

The Government does recognize certain factors in the defendant's favor. In particular, the Government does credit the defendant for the contributions he has made to the community. The defendant opened and ran a business in Southeast Washington, DC, and actively supports civic and charitable organizations. The value of those contributions is reflected in the numerous letters of support filed with the Court on behalf of the defendant. These factors have led the Government to decline to seek an enhanced penalty and to allocute below the top of the applicable, un-enhanced guideline range. But the defendant's history does not and cannot give the defendant a free pass at sentencing. Even for someone with only one prior felony conviction, the D.C. City Council has passed a statute that requires the Court to impose a mandatory minimum period of incarceration for the crime of Unlawful Possession of a Firearm. Based on the defendant's criminal history score – 5.0 criminal history points – the applicable sentencing guideline range calls for a sentence of at least 30 months of incarceration, and does not permit a probationary sentence. Moreover, those guidelines provide no basis for a downward departure in this case. See Guideline 5.2.3. Given the seriousness of the offense, the refusal to accept responsibility, and the defendant's history, a downward departure would be unjust.

III. Allocution

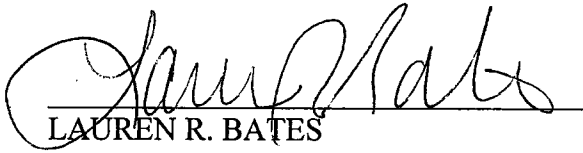
Wherefore, considering the above factors, the Government respectfully requests that the Court sentence the defendant on the charge of Unlawful Possession of a Firearm to 40 months of incarceration, to be followed by three years of supervised release, with the terms and conditions recommended in the PSR. The Government further requests that the Court sentence the defendant to concurrent sentences of 360 days of incarceration on the charges of Possession of Unregistered Firearm and Unlawful Possession of Ammunition.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney

LISA GREENE
Assistant United States Attorney
Chief, General Crimes Section

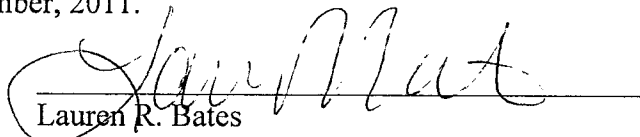
By:


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December 8, 2011

Certificate of Service

I hereby certify that I have caused to be served a copy of the foregoing via electronic mail to Brian McDaniel, Esq., this 8th day of December, 2011.


Lauren R. Bates
Assistant United States Attorney